In the High Court of Punjab and Haryana, Chandigarh

C.W.P. No. 3875 of 2005

Date of Decision: 30.01.2007

Punjab State Industrial Development Corporation Limited

…Petitioner

Versus

Union of India and others

…Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR
HON'BLE MR. JUSTICE VINOD K. SHARMA

PRESENT: Mr. Govind Goel, Advocate,
for the petitioner.

Ms. Ranjana Shahi, Central Government Counsel.

JUDGMENT

M.M. KUMAR, J.

The short issue raised in this petition filed under Article 226 of the Constitution is whether a secured creditor like the petitioner would have preferential right on account of registered charge created on the property of the company for recovery of its dues over the dues of the Central Excise being the crown debts.

Brief facts of the case may first be noticed. The petitioner is a Government Corporation imparting financial assistance for setting up industry in the State of Punjab (PSIDC). On 6.1.1992, M/s Jay Enn Castings (respondent No. 4) secured a loan of Rs.

98,00,000/- from the PSIDC for setting up an industrial unit at Lalru (District Patiala). However, it availed a sum of Rs. 80,00,000/-. In order to secure repayment of loan, M/s Jay Enn Castings mortgaged its movable and immovable properties by executing hypothecation deed and equitable mortgage deed with the PSIDC on 23.1.1992 and 24.1.1992. The aforementioned course was adopted in pursuance to Article 4 of the Loan Agreement, which reads as under:-

> "Security for the loan:
>
> a) The loan together with interest, commitment charge, premium on pre-payment, costs, charges, expenses and other monies due and payable under this agreement shall be secured by:-
>
> i) a first mortgage over the borrowers' immoveable and moveable properties including its moveable machinery, spares tools and accessories, present and future; and
>
> ii) a first mortgage on all the remaining assests of the borrower, present and future (save and except book debts in case of hypothecation), subject to prior charges created and/or to be created in favour of the borrowers' bankers on the borrowers' stocks of raw materials, semi finished and finished goods, consumable stocks and book debts

and such other moveables as may be agreed to by the lenders for securing borrowings for working capital requirements in the ordinary course of business. The mortgage and charge shall be in such form and manner as may be prescribed by the lenders.

The mortgage and charge shall rank pari passu with the mortgage and charges created and/or to be created in favour of PFC for their respective financial in terms of approved financial plan as given in Schedule II hereto."

A memorandum of entry showing the deposit of title deed and creating equitable mortgage on the properties of M/s Jay Enn Castings was made between the parties on 24.1.1992 (P-1). On account of irregularities in repayment of loan, the PSIDC invoked Section 29 of the State Financial Corporations Act, 1951 (SFC Act) and ordered taking over the assets of M/s Jay Enn Castings on 10.8.1999 (P-2). Accordingly, the PSIDC came in possession of the moveable and immoveable properties of M/s Jay Enn Castings.

The Superintendent, Central Excise, Derabassi, addressed a letter to the PSIDC on 7.9.1999 (P-3) requesting that while taking action for the recovery of its dues by the PSIDC, the outstanding dues of Central Excise against M/s Jay Enn Castings may also be taken into account. The correspondence between the PSIDC

and the Superintendent, Central Excise (respondent No. 3) shows that both were claiming preference for recovery of their respective dues over the properties of M/s Jay Enn Castings. The stand of the PSIDC in its letter dated 2.8.2004 (P-5) has been that it being secured creditor, was entitled to settle its account from the proceeds of the mortgaged property of M/s Jay Enn Castings and the question of adjusting the dues of Central Excise Department would arise only thereafter. On 14.10.2004, the Superintendent, Central Excise, intimated the PSIDC that the property belonging to M/s Jay Enn Castings was being attached under Section 142 of the Customs Act, 1962 and that the PSIDC was to refrain from disposing of the said property. In response thereto the PSIDC sent a detailed reply on 17.11.2004 (P-7), inter alia, stating that the property belonging to M/s Jay Enn Castings was mortgaged with the PSIDC as a security for recovery of loan which had already been taken over under Section 29 of the SFC Act. It was suggested that the Central Excise could not proceed with attachment of property under Section 142 of the Customs Act as the PSIDC had the preferential right for the sale of mortgaged assets including the property in question. Thereafter, the Central Excise Department proceeded to issue advertisement for disposing of the property on 25.1.2005. The open auction was fixed for 22.2.2005, which could not materialise. Another advertisement again was issued on 3.3.2005 and the date of auction was fixed for 15.3.2005 (P-8). Feeling aggrieved, the PSIDC has approached this Court asserting that it has preferential right being mortgagee, for

quashing the order of attachment, dated 14.10.2004, issued under Section 142 of the Customs Act and has also prayed for issuance of direction restraining the Department of Central Excise (respondent Nos. 1, 2 and 3) from proceeding further for auction or in any manner dealing with the property in question.

The broad factual position as asserted in the petition has not been disputed. It has been asserted that after taking over M/s Jay Enn Castings, the PSIDC has not been able to liquidate the assets of the company since 1999 and the delay caused has adversely affected the prospects of the property. It has further been asserted that there is no entry in the revenue record showing that the land was mortgaged with the PSIDC as a security. It is claimed that the right of the Central Excise Department to recover excise duty even after taking over the industry under Section 29 of the SFC Act is to prevail and the PSIDC must give way. According to the respondents in a mortgage only interest in the property is transferred to the mortgagee and the property still lies with the mortgager, therefore, in such a situation the Central Excise Department is vested with full power under Section 11 of the Central Excise Act, 1944 read with Section 142 of the Customs Act to effect recovery of its dues. It is claimed that charge by the Central Excise Department was created on 27.2.1998, which is much earlier than the claim of the PSIDC, which came into picture after M/s Jay Enn Castings started committing default in its payment.

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Mr. Govind Goel, learned counsel for the petitioner has submitted that it is well settled proposition of law that the crown debts like the Central Excise would not attain preference over secured creditor who had registered charge by virtue of mortgage or equitable mortgage. In support of his submission learned counsel has placed reliance on para 10 and 15 of the judgment of Hon'ble the Supreme Court in the case of **Dena Bank v. Bhikhabhai Prabhudas Parekh and Co., AIR 2000 SC 3654**. He has further placed reliance on a Single Bench judgment of this Court, disposing of a bunch of petitions on 4.12.2006, titled as **Union of India v. Punjab State Industrial Development Corporation Ltd., Chandigarh and another (C.W.P. No. 3413 of 2005)** and a Division Bench judgment of this Court in the case of **Employees Provident Fund Organisation v. Punjab State Industrial Development Corporation and another (C.W.P. No. 15990 of 2005, decided on 4.7.2006)**.

Ms. Ranjana Shahi, learned counsel for respondent Nos. 1, 2 and 3 has placed reliance on the judgment of Hon'ble the Supreme Court in the case of **Macson Marbles Pvt. Ltd. v. Union of India, 2003(158) E.L.T. 424 (S.C.)**.

After hearing learned counsel for the parties we are of the considered view that the instant petition deserves to be allowed because the issue raised in the instant petition stands concluded in favour of the PSIDC by the judgment of Hon'ble the Supreme Court in Dena Bank's case (supra). Learned counsel for the petitioner has

rightly placed reliance on para 10 of the judgment where the common law doctrine of preferring crown debts has not been extended to granting priority over the secured private debts. The aforementioned para deserves to be extracted extenso:

> "10. However, the Crowns preferential right to recovery of debts over other creditors is confined to ordinary or unsecured creditors. The Common Law of England or the principles of equity and good conscience (as applicable to India) do not accord the Crown a preferential right for recovery of its debts over a mortgage or pledge of goods or a secured creditors. It is only in cases where the Crown's right and that of the subject meet at one and the same time that the Crown is in general preferred. Where the right of the subject is complete and perfect before that of the King commences, the rule does not apply, for there is no point of time at which the two rights are at conflict, nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. In Giles v. Grover (1832) 131 ER 563 it has been held that the Crown has no precedence over a pledge of goods. In Bank of Bihar v. State of Bihar, AIR 1971 SC 1210, the principle has been recognised by this Court holding that the rights of the pawnee who has parted with money in favour of the pawnor on the security of the goods cannot

be extinguished even by lawful seizure of goods by making money available to other creditors of the pawnor without the claim of the pawnee being first fully satisfied. Rashbehary Ghose states in Law of Mortgage (T.L.L., Seventh Edition, P. 386) – 'It seems a Government debt in India is not entitled to precedence over a prior secured debt'.

The aforementioned view has been followed by a learned Single Judge of this Court in the case of **Union of India v. Punjab State Industrial Development Corporation Ltd., Chandigarh and another** (C.W.P. No. 3413 of 2005, alongwith other bunch of petitions, decided on 4.12.2006). Accordingly, the writ petition deserves to be allowed.

The argument of the learned counsel for the respondents that Hon'ble the Supreme Court in Macson Marbles's case (supra) has held in favour of the Central Excise Department does not deserve to be accepted because in that case the question raised in the instant petition is not debated. There was no issue as to whether in their capacity as mortgagee the financial institution was entitled to realise its dues in preference to the dues of the Department of Central Excise or the crown debts. Therefore, the reliance on the judgment of Hon'ble the Supreme Court in Macson Marbles's case (supra) is wholly misplaced, does not advance the case of respondent Nos. 1, 2 and 3. Therefore, we have no hesitation to reject the argument.

For the reasons aforementioned, this petition succeeds. We declare that the PSIDC have a preferential right to recover its dues as it is a secured creditor having prior registered charge by virtue of mortgage and equitable mortgage over the moveable and immoveable assets of M/s Jay Enn Castings. The charge of the Central Excise Department is preferable only to unsecured creditors.

The writ petition is allowed in the above terms.

(M.M. KUMAR)
JUDGE

(VINOD K. SHARMA)
JUDGE

January 30, 2007

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